

companies act 2006 – part 1

relevant to ACCA Qualification Paper F4 (ENG) and (SCT)

a new act

■ This is the first of two articles on the Companies Act 2006 (CA 2006). The second article will be published in the March 2008 issue of *student accountant* and will address the new provisions introduced by the CA 2006 as they relate to companies' articles of association. Due to the size of the CA 2006, it is not possible to provide a detailed review, so this article focuses on the aspects that are most important for Paper F4 (ENG) and (SCT) students. Please note that although these topics are important, and hopefully interesting, the content of these articles may not be examined in the near future.

This article deals with the following topics:

- types of companies
- company formation
- share capital
- company resolutions.

Unless otherwise stated, all references are to the CA 2006.

TYPES OF COMPANIES

Sections 3 to 6 of CA 2006 provide for the establishment of different types of companies.

Section 3: Limited and unlimited companies

This section restates Section 1(2) of the 1985 Act; as previously, a company may be limited by shares or by guarantee as follows:

- If the liability of shareholders is limited to the amount, if any, unpaid on the shares held then it is a limited company.
- If the liability is limited to the amount that the members undertake to contribute to the assets of the company in the event of its being wound up, the company is 'limited by guarantee'. Companies limited by guarantee are specifically prohibited from registering with share capital (s.5).
- If there is no limit on the liability of its members, it is an unlimited company.

Section 4: Private and public companies

Section 4 merely restates the provisions of Section 1(3) of the 1985 Act. Thus a 'private company' is defined as any company that is not a public company, and one that may not offer shares to the public. A 'public company', on the other hand, is a company whose certificate of incorporation states that it is a public company. Section 4 does refer to Part 20 of the Act, which sets out the key differences between public and private companies; for example, before it can begin to start its business activities, a public company must secure a trading certificate from the Companies Registry (s.761). To obtain the necessary certificate, the public company must meet the minimum share capital requirement (the 'authorised minimum'), which is currently set at £50,000 (as stated in Section 763) and which remains unchanged under CA 2006. The authorised minimum can be stated in sterling or the euro equivalent to the prescribed sterling amount. In addition, any shares issued must be paid-up to at least one quarter of their nominal value (s.586).

Section 6: Community interest companies

Part 2 of the Companies (Audit, Investigations and Community Enterprise) Act 2004 established a new company form, the 'community interest company' or CIC. Such enterprises were designed for use by social enterprises, and although registered under the Companies Act, they have to complete certain additional formalities and are subject to certain additional elements of regulation. As they are not business forms as such, they will not be considered in any detail.

COMPANY FORMATION

Section 7 sets out the method for forming a company, which is that one or more persons must subscribe their name to a

memorandum of association and comply with the requirements of the provisions of the Act as to registration. It should be noted that the Act allows a single person to form any type of company, either public or private. Subsection (2) simply restates the requirement that a company may not be formed for an unlawful purpose. Under Section 9, two documents must be delivered to the registrar: the memorandum of association and the application for registration.

The memorandum of association

Although CA 2006 retains the previous requirement for individuals wishing to form a company to subscribe their names to a memorandum of association, it significantly reduces the importance of the memorandum, and, as a consequence, it will not be possible to amend or update the memorandum of a company formed under CA 2006.

Nonetheless, the memorandum of association, which must be in the prescribed form, remains an important document to the extent that, as required by Section 8, it provides evidence of the intention of the subscribers to the memorandum to form a company and become members of that company on formation. Also, in relation to a company limited by shares, the memorandum provides evidence of the members' agreement to take at least one share each in the company.

Under Section 28, provisions in the memorandum of existing companies will be treated as provisions in the articles of the company if they are of a type that will not be included in the memorandum of companies formed under the Act.

Section 9: Registration documents

This section sets out the information, or 'documents', that must be delivered to the registrar when an application for registration

is made. In all cases, the application for registration must state the following:

- The company's proposed name.
- Whether the company's registered office is to be situated in England and Wales (or Wales), in Scotland or in Northern Ireland.
- A statement of the intended address of the company's registered office (that is, its postal address as opposed to the preceding statement confirming the jurisdiction in which the company's registered office is to be situated).
- Whether the liability of the company's members is to be limited and if so, whether it is to be limited by shares or by guarantee.

- Whether the company is to be a private or a public company.
- A statement of capital and initial shareholdings or a statement of guarantee (ss.10 and 11 set out the detailed provisions in these regards – see below).
- A statement of the company's proposed officers (s.12 – see below).
- A copy of any proposed articles to the extent that the company does not intend to use the model articles (this issue is covered in the next article).
- A statement of compliance (s.13 – see below).

Section 10

This section sets out the contents of the statement of capital and initial shareholdings.

This statement essentially provides a 'snapshot' of a company's share capital at the point of registration. For public companies, this requirement is linked to the abolition of authorised share capital (see below for more on this). The statement of capital and initial shareholdings must contain the following information:

- The total number of shares of the company to be taken on formation by the subscribers to the memorandum.
- The aggregate nominal value of the shares.

- For each class of shares:
 - a the prescribed particulars of the rights attached to those shares
 - b the total number of shares of that class
 - c the aggregate nominal value of shares of that class.
- The amount to be paid up and the amount (if any) to be unpaid on each share (whether on account of the nominal value of the shares or by way of a premium).
- Such information as may be prescribed for the purpose of identifying the subscribers to the memorandum of association.
- With respect to each subscriber to the memorandum, it must state:
 - a the number, nominal value (of each share), and class of shares to be taken on formation
 - b the amount to be paid up and the amount (if any) to be unpaid on each share (whether on account of the nominal value of the share or by way of premium).

Where a subscriber to the memorandum is to take shares of more than one class, the information required under Subsection (4)(a) is required for each class.

Section 11

This section sets out the contents of the statement of guarantee that must accompany the application for registration where it is proposed that a company will be limited by guarantee on formation. The statement of guarantee must contain the information to identify the subscribers to the memorandum.

Section 12

This section, which relates to the statement of the company's proposed officers, requires the submission of particulars relating to the following:

- The person or persons who is or are to be the first director or directors of the company. The details are set out in Sections 163 to 166. The main change is that a service address must be provided for each director who is a natural person, in addition to the requirement for the usual residential address.

- The person or persons who is, or are, to be the first secretary.

As private companies are no longer required to appoint company secretaries (see s.270(1)), this information is only required if the company actually appoints someone to that role.

Section 13

This section concerns the requirement of a statement of compliance. Such a statement does not need to be witnessed and may be made in either paper or electronic form. Under Section 1068, the registrar is authorised to specify the rules relating to, and who may make, such a statement. Section 1112 makes it a criminal offence to make a false statement of compliance, as is the case in relation to all documents delivered to, or statements made to, the registrar.

If the registrar is satisfied that the requirements of CA 2006, as to registration, are complied with, then the documents delivered shall be registered and, on registration, the registrar shall issue a certificate that the company is duly incorporated. The registration certificate must state:

- a the name and registered number of the company
- b the date of its incorporation
- c whether it is a limited or unlimited company, and if it is limited whether it is limited by shares or by guarantee
- d whether it is a private or a public company
- e whether the company's registered office is situated in England and Wales (or in Wales), in Scotland, or in Northern Ireland.

As before, once issued, the certificate is conclusive evidence that the requirements of the Act as to registration have been complied with and that the company is duly registered under the Act.

SHARE CAPITAL

The word 'capital' is used in a number of different ways in relation to shares.

Statement of capital and initial shareholdings

Under the provisions of CA 1985, the memorandum of a limited company with a share capital was required to state the amount of the share capital with which the company proposed to be registered, and the nominal amount of each of its shares. This was known as the 'authorised share capital' and set a limit on the amount of capital which the company could issue, subject to increase by ordinary resolution. Section 9 of CA 2006 removes the concept of 'authorised capital' and replaces it with the requirement to submit an application to register the company.

The statement of capital and initial shareholdings is essentially a 'snapshot' of a company's share capital at the point of registration. Section 10 requires the statement of capital and initial shareholdings to contain the following information:

- The total number of shares of the company to be taken on formation by the subscribers to the memorandum.
- The aggregate nominal value of those shares.
- For each class of shares:
 - a the prescribed particulars of the rights attached to those shares
 - b the total number of shares of that class
 - c the aggregate nominal value of shares of that class.
- The amount to be paid up and the amount (if any) to be unpaid on each share (whether on account of the nominal value of the shares or by way of a premium).

The statement must contain such information as may be required to identify the subscribers to the memorandum of association. With regard to such subscribers, it must state:

- the number, nominal value (of each share), and class of shares to be taken by them on formation
- the amount to be paid up and the amount (if any) to be unpaid on each share.

Where a subscriber takes shares of more than one class, the above information is required for each class.

Issued capital

This represents the nominal value of the shares actually issued by the company; public companies must have a minimum issued capital of £50,000 or the prescribed euro equivalent (s.763).

Called-up capital

This is the proportion of the nominal value of the issued capital actually paid by the shareholder (s.547). It may be the full nominal value, in which case it fulfils the shareholder's responsibility to outsiders; or it can be a part payment, in which case the company has an outstanding claim against the shareholder. Shares in public companies must be paid up to the extent of at least a quarter of their nominal value (s.586).

Once established, the nominal value of the share remains fixed and does not normally change. However, the value of the shares in the stock market may be subject to daily fluctuation depending on a number of interrelated factors, such as the profitability of the company, the prevailing rate of interest or prospective takeover bids. Thus the market value of a share of £1 nominal value may be as much as £5 or higher, or as low as one penny.

COMPANY RESOLUTIONS

Under the provisions of CA 2006 there are three types of resolutions: ordinary resolutions, special resolutions, and written resolutions.

Ordinary resolutions

Section 282 defines an ordinary resolution of the members (or class of members) of a company as a resolution that is passed by a simple majority.

If the resolution is to be voted on a show of hands, the majority is determined on the basis of those who vote in person or as duly appointed proxies. Where a poll vote is called, the majority is determined in relation to the total voting rights of members who vote in person or by proxy.

Special resolutions

A special resolution of the members (or of a class of members) of a company means a

resolution passed by a majority of not less than 75%. This is determined in the same way as for an ordinary resolution (s.283). If a resolution is proposed as a special resolution, it must be indicated as such, either in the written resolution text or in the meeting notice. Where a resolution is proposed as a special resolution, it can only be passed as such, although anything that may be done as an ordinary resolution may be passed as a special resolution (s.282(5)). There is no longer a requirement for 21 days' notice where a special resolution is to be passed at a meeting.

Under the provisions of CA 2006 there are three types of resolutions: ordinary resolutions, special resolutions, and written resolutions.

Where a provision of the Act requires a resolution, but does not specify what kind of resolution is required, the default provision is for an ordinary resolution. However, the company's articles may require a higher majority, or, indeed, may require a unanimous vote to pass the resolution. The articles cannot alter the requisite majority where the Act actually states the required majority, so, if the Act provides for an ordinary resolution, the articles cannot require a higher majority.

Written resolutions

Private limited companies are no longer required to hold meetings and can take decisions by way of written resolutions (s.281). The Act no longer requires unanimity to pass a written resolution. It merely requires the appropriate majority of total voting rights, a simple majority for an ordinary resolution (s.282(2)) and a 75% majority of the total voting rights for a special resolution (s.283(2)).

Section 288(5) states that anything which, in the case of a private company, might be done by resolution in a general meeting, or by a meeting of a class of members of the company, may be done by written resolution

with only two exceptions – the removal of a director, and the removal of an auditor.

These both require a general meeting of shareholders to be called. A written resolution may be proposed by the directors or the members of the private company (s.288(3)). Under Section 291, in the case of a written resolution proposed by the directors, the company must send or submit a copy of the resolution to every eligible member. This may be done either by:

- sending copies to all eligible members in hard copy or electronic form or by means of a website
- submitting the same copy to each eligible member in turn, or different copies to each of a number of eligible members in turn
- by a mixture of the above.

The copy of the resolution must be accompanied by a statement informing the members both how to signify agreement to the resolution and the date by which the resolution must be passed if it is not to lapse (s.291(4)). It is a criminal offence not to comply with the above procedure, although the validity of any resolution passed is not affected.

The members of a private company may require the company to circulate a resolution if they control 5% of the voting rights (or a lower percentage if specified in the company's articles). They can also require a statement (of not more than 1,000 words) to be circulated with the resolution (s.292). However, the members requiring the circulation of the resolution will be required to pay any expenses involved, unless the company resolves otherwise.

Agreement to a proposed written resolution occurs when the company receives an authenticated document, in either hard copy or electronic form, identifying the resolution and indicating agreement to it. Once submitted, agreement cannot be revoked.

The resolution and accompanying documents must be sent to all members who are entitled to vote on the circulation date of the resolution. The company's auditor should also receive such documentation (s.502). ■

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